Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL.,

Petitioners,

v.

MARIE MANHART, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA AND COLLEGE RETIREMENT EQUITIES FUND, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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Preliminary Statement

By consent of all parties, Teachers Insurance and Annuity Association of America and College Retirement Equities Fund ("TIAA-CREF") submit this brief as *amici curiae* in support of petitioners. This brief points out: (a) the adverse and discriminatory impact that would result if private insurers such as TIAA-CREF were required to ignore differences in male-female mortality rates, and (b) the inappropriate deference accorded by the majority below to an EEOC guideline relating to the same subject.

Interest of the Amici

The Carnegie Foundation for the Advancement of Teaching established TIAA in 1918 as a non-profit New York life insurance company. CREF was created in 1952 by a special New York Act as a companion non-profit corporation. TIAA and CREF were founded to offer retirement and other fringe benefits plans suited to the needs of the teaching staffs and other employees of colleges and universities. Nearly 500,000 employees are covered by the system. Over 85 percent of all private four-year colleges and universities and over 40 percent of all public colleges and universities cover some or all of their personnel by TIAA-CREF annuity plans. A number of institutions have also adopted collective life insurance plans managed by TIAA-CREF, to complement the annuity plans. The TIAA-CREF system was cited as a model for recent Federal pension reform legislation.*

These retirement and insurance plans are normally established by board resolutions of the participating institutions, but there is no contract between TIAA or CREF and the employing institution. Each participating employee individually contracts directly with TIAA and/or CREF. Contributions are then made at equal rates by and on behalf of all similarly situated employees, regardless of sex. All similarly situated employees thus receive life insurance coverage and/or lifetime annuities, that have equal actuarial values.

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*Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 73-406, 88 Stat. 829 (1974). Senator Jacob Javits, in testifying before the House Ways and Means Committee on this legislation, stated (Hearings on H.R. 12272, May 8, 1972):

> "We need to learn something from the success of the College Teachers Retirement System—'TIAA-CREF'—which would be a real model for private industry. . . ."

The TIAA-CREF plans therefore differ significantly from the instant retirement plan as to employee contributions, the essential fact on which the majority below, upon rehearing, based its decision concerning the Bennett Amendment. Unlike the plan here, greater contributions are *not* required in the TIAA-CREF system from employees of either sex. Accordingly, in this respect, the decision of the majority below has no application to the plans managed by TIAA-CREF, nor are we submitting this brief to address that question.

Our interest is two-fold. First, it has been argued that the decision of the majority below, requiring "individualized" treatment while simultaneously conceding its impossibility in an insurance context, means that an insurer such as TIAA-CREF purportedly violates Title VII whenever it takes into account acknowledged disparities in male-female longevity in computing its rates. Second, the majority of the Court below, misconstruing the import of the Bennett Amendment in Title VII (Civil Rights Act of 1964, § 703(a)(1) 42 U.S.C. § 2000e-2(h)), inappropriately deferred to a recent guideline of the EEOC concerning retirement benefits, that has also been urged as supposedly applicable to plans managed by TIAA-CREF.

Indeed, there has been a continuing effort to apply the decisions of the court below concerning the municipal plan involved here to annuity plans of private insurers such as TIAA-CREF. *See, e.g., Equal Employment Opportunity Commission* v. *Colby College, et al.*, No. 75-136 SD (D. Me., October 27, 1977) one of six litigations now pending in this country against educational institutions and TIAA-CREF.* Like all insurers issuing individual contracts, TIAA-CREF take the differing male-female longevity into

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*Because of its applicability to the issues here and because it is as yet unreported, we have included Judge Gignoux' opinion in the *Colby College* case as Addendum B hereto.

account in computing life insurance and annuity benefit rates, because, as private insurers, they must accord equitable treatment to all of their participants and ensure the financial integrity of their plans.

The implications of proscribing recognition of those differentials in private insurance and annuities would be enormous; substantial questions as to financial integrity would arise and real inequalities would be created where none exists now. At a minimum, in the TIAA-CREF system alone, it would unnecessarily and improperly impose tens of millions of dollars of added costs upon the already strained resources of higher education. And it would unfairly cause increases in the costs of annuities and life insurance respectively for the millions of policy holders, male and female, throughout the country, and could well involve increased costs for the entire pension industry.

Retirement Income and the Annuity Principle

Although this case relates to fundamental insurance and annuity concepts, the courts below seemingly gave almost no consideration to them. Because such concepts, we submit, are basic to any discussion of this subject, let alone to any determination relating thereto, we set forth the following summary of those concepts as they relate to the lifetime pension benefits involved in this case.

(a) The Annuity Principle

The purpose of a pension plan providing lifetime benefits is to ensure that a retiree will receive an income throughout his or her life, an income that cannot be outlived. In essence, it is the reverse of life insurance—the pension income protects people against the financial risk of "living too long." In order to make such a plan financially viable, its actuary must know at the outset the extent of the plan's obligations, *i.e.*, how long benefits are expected to be paid.

The extent of the life span to be covered is obviously a basic element in this computation. But no one can predict how long a particular person will live after retiring. Thus, the plan's actuary must determine the cost of committing the plan to a rate of payments for life, without then knowing, or being able to determine in advance, the length of time for which payments will have to be made to any particular retiree.

By combining the risk applicable to a large enough number of persons, however, the actuary, by applying the law of large numbers, can make the necessary prediction on the basis of statistical fact. The rates at which funds must be accumulated in order to pay benefits to all retirees without exhausting the funds before the last retiree has died can thus be determined with precision. Each individual can be protected against outliving his or her retirement income and avoid the risk caused by the impossibility of predicting when any particular individual will die. This is the annuity principle, as applied to a pension plan of the type involved here. As noted, its operation depends upon application to large groups.

(b) Risk Classification and Equity

Insurers and pension plans can make accurate cost determinations among participants only by employing fundamental concepts of risk classification; that is, by identifying groups of persons who can be expected to exhibit the same degree of risk. The actuary must have a reliable basis for grouping individuals in risk categories or classes so that all persons within each class of persons present a similar risk of living or dying.

Each person within each class so identified can then be accorded the same expectation of benefits per dollar of cost to the plan, since all persons within the classes so estab-

lished present approximately the same risk, or probability of loss, to the pension plan or insurer. This is the principle of "equity". It is required for insurance and annuities by the laws of most states. (*E.g.*, N.Y. Ins. Law (McKinney) § 209).

Principles of risk classification are basic to insurance and retirement plans. Under insurance plans, for example, in order to attract a large enough group of individuals to form a pool so that the insurance will be economically viable, rates charged to individuals must be made fair and equitable. This is done by classifying insureds on the basis of risk factors which are significant, statistically measurable and directly related to the expected risk of loss. If individuals are forced to pay premiums which subsidize other persons' risks that are substantially greater than their own (*e.g.*, owners of brick homes near a fire department paying the same premiums as owners of wooden homes remotely located), they will eventually withdraw from the pool.

The object of classification for the funding and payment of lifetime pension benefits, then, is to classify into groups individuals having very close to the same risk in terms of longevity. Age is one factor in determining this risk. Obviously, a group of persons aged 55 can be expected to live more years than a group aged 65. The other immutable factor which has been statistically demonstrated to have a significant effect upon mortality rates is the sex of the individuals.* Statistics have consistently shown significantly lower mortality rates at every age among females than

*Although race is sometimes also mentioned in this respect, we are not aware of any data on annuitant mortality to support this view. To the contrary, the statistics which are available concerning the general population show that, at the higher ages (which are the ages relevant here), there is no significant difference in the longevity of whites and non-whites. These statistics also show that the *same* kind of differences in male-female longevity exist for non-whites as for whites. *See* Pub. Health Service, U.S. Dep't of Health, Educ., and Welfare, Vital Statistics of the United States, Vol. II, Part A, p. 5-8 (1972).

among males. It follows that when persons are classified for purposes of computing the costs of lifetime retirement incomes, women should be grouped with men having the same prospective mortality risk, or life expectancy—that is, with men who are several years younger. It would be no more realistic to place men aged 65 in the same risk classification as women aged 65 than it would be to place women aged 65 with women aged 60.

(c) Cost Impact

The effects of the differences in male-female mortality rates upon the retirement plan here can be seen easily from the Tables 1-3 included in Addendum A hereto. These Tables reflect the application of the mortality tables used by petitioners (A. 84) to groups of 100,000 males and 100,000 females, aged 65. The Tables were prepared by the actuaries of TIAA-CREF.

Table 1 demonstrates the survival experience of these groups. As confirmed by this Table, more women than men will survive at every age and, as a result, more payments will be required almost from the outset for many more women than men—at age 90, for example, to nearly twice as many.

The effect of greater female longevity also appears when the aggregate number of deaths to date is compared, as is done in Table 2. As shown there, 37 percent of the men, but only 25 percent of the women will have died at age 75. And, by age 85, 79 percent of the men will have died, compared with only 67 percent of the women. The greater number of male deaths means, of course, that fewer total payments are required for the surviving men as a group, than for the surviving women.

This need for additional payments to the women appears clearly from Table 3 in Addendum A, which compares the aggregate number of years that will be lived by the men and the women (men, 1,470,820 years, and women, 1,759,639 years). Converting these additional

years lived into the number of periodic payments that must be made during those years shows that, if the payments are made annually, the females will receive a total of about 300,000 more payments than the males.

Indeed, because of greater female longevity, nearly all of the women in the plan will have received more at the time of their deaths than the men who have died at the same points in relation to the remainder of their respective groups. This can be seen by comparing the total amount of periodic payments received by each of the males and females, according to the order in which they died (*i.e.*, beginning with a comparison of the man and woman who died first and proceeding with like comparisons to those who died last). This, of course, is the order in which retirement benefits cease. Such a comparison, using the data set forth in Tables 1-3, would show that nearly 100 percent of the women so compared will have received more payments (and, since the periodic payments in this retirement plan are equal, more dollars) than their male counterparts—still another reflection of the greater female longevity.

In sum, there can be no question as to the higher cost of providing retirement benefits of the same periodic amount to women as to men of the same age. To recognize this fact is not "discrimination" of any sort against anyone, and certainly not against the women. If a retirement plan is to remain solvent, a greater amount must be accumulated for the women than for the men of the same age, assuming the amounts are to be paid out in equal periodic amounts; or, if the same amounts are to be accumulated for both groups, the accumulations must be paid out in somewhat lower periodic amounts to the women.

The Decision Below

The Ninth Circuit recognized the "unique" nature of the issue here when it initially considered this case on appeal. It stated (553 F.2d at 586):

> "In the present case a relevant characteristic in determining how large an individual's retirement contribution should be is an informed prediction as to how long the person will live. But this characteristic, unlike those in the prior cases, is impossible to determine on an individual basis at the time when the contribution must be made. Thus, the policy of allowing relevant factors to be considered can be met only by allowing the group longevity statistics to be attributed to the individual members of the group."

Having conceded the impossibility of individual testing and analysis in the context of this case, the court nevertheless held in effect that such treatment is required by Title VII. Further, the Ninth Circuit rejected the applicability of section 703(h) of Title VII (the Bennett Amendment), which provides that differentiations on the basis of sex that are permitted under the Equal Pay Act are also permissible under Title VII. The Court of Appeals bottomed its decision on an administrative ruling by the EEOC which had concluded that generalizations relating to sex "cannot be permitted to influence the terms and conditions of an *individual's* employment, even where the generalizations are statistically valid." (553 F.2d at 591) (Emphasis in orignal).

The decision of this Court in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976) (hereafter, *"Gilbert"*) led to a rehearing. Two of the judges adhered to their original opinion. Referring to the legislative history of the Bennett Amendment that they had rejected in their initial opinion, these judges made the curious statement that: "We did not find it [originally] to be persuasive legislative history; the Supreme Court did find it persuasive." (553 F.2d at 593). Although agreeing that they were "bound by that conclusion" (*id.*), which was in conflict with their own, these

judges still concluded that their own original opinion was not in error.

All this led one of the judges on the panel, Judge Kilkenny, to reverse himself and to file a sharp dissent. He was convinced that the principles enunciated by this Court in *Gilbert* were controlling and that the standards of the Equal Pay Act sanctioned the instant practice. Suggesting that the majority was "playing with words" (553 F.2d at 595), he stated (at 597):

> "The majority's tortured views on the obvious breadth of *General Electric* become apparent in its writing around and failure to accept the Supreme Court's application of this regulation [under the Equal Pay Act]. This regulation, as I read it, contemplates the actuarial equivalent of the scheme before us. If employer contributions are equal for men and women, there is no statutory violation even though the resulting benefits are not equal as between men and women."

As the following analysis will show, Judge Kilkenny was correct. Under these circumstances, his concluding remarks present, we think, the proper rule (553 F.2d at 598):

> "One must sympathize with the plight of the appellants—a plan drawn up to comply with the regulations of the Wage and Hour Division will inevitably conflict with the recent regulations of the EEOC. This typifies the type of 'no win' situation alluded to by the Supreme Court in *General Electric* [429 U.S. at 140, n.18], and reinforces my conclusion that the discrimination, if any, fostered by this plan is of a type which did not concern Congress when enacting Title VII."

Summary of Argument

The majority below concluded that Title VII had been violated because each of the employees under the instant retirement plan was supposedly not treated as an individual, in that the plan required differing employee contributions from men and women, based upon mortality tables reflecting differences in male-female longevity.

The majority reached its conclusion by comparing men and women of the same age. But, in so doing, the majority was in fact comparing groups who were not similarly situated as to the essential element, life expectancy. Actuarial studies have consistently demonstrated that women, at every age, have lower mortality rates than men of the same age. Concepts of prohibited "discrimination" articulated by this Court have never proscribed treating different classes of persons differently. It is just as discriminatory to treat dissimilarly situated classes equally as it is to treat similarly situated classes differently.

There is nothing arbitrary or irrational about recognizing the conceded and objectively identifiable disparity in male-female life expectancy in computing rates for retirement plans. Far from constituting a mere pretext for discrimination against either sex, recognition of this difference in longevity ensures financial viability for the plans and equitable treatment for all participants.

It is unrealistic and unworkable to attempt to force an "individualized" analysis upon an insurance context. Unlike the possibility of testing job applicants for their qualifications before employment, there is simply no way to determine in advance when a particular person will die. (This, of course, is the reason that insurance and annuities exist). The majority below conceded that individual testing in this respect was impossible, but nevertheless concluded that Title VII had been violated. Hence, the majority's reasoning would lead to the possibility of entities being held liable

under Title VII for having failed to accomplish the impossible—a result which Congress could not have intended.

Insurance, by its nature, requires reference to groups. Accordingly, as we believe was confirmed by this Court in *Gilbert*, the measurement of equality in an insurance context should be made in terms of groups, not individuals. An employer complies with Title VII when it provides insurance coverage of the same value, or worth, to equal groups of men and women (*Gilbert* p. 139, n.17). In this case, the employer actually made greater contributions on behalf of the women than the men and, accordingly, provided the women with an income at retirement of a greater value than that provided for the men.

To require insurers to ignore the acknowledged differences in the mortality rates of men and women, as some have urged is indicated by the decision of the majority below, would create real inequalities where none exists now in private insurance plans such as those managed by TIAA-CREF. It would also unfairly impose increased costs upon both men (who would be charged higher rates for annuities) and women (who would be charged higher rates for life insurance). No such result is required by Title VII. Moreover, even if the recognition of the disparity in male-female longevity constituted "discrimination" under Title VII (and it does not), the recognition would be fully justified by the fundamental necessities of the business of insurance.

The majority below also deferred inappropriately to a recent guideline of the EEOC, in concluding that a violation of Title VII had occurred. In so doing, the majority erred, because: (1) the Bennett Amendment in Title VII requires that interpretations of the Equal Pay Act are also applicable to Title VII when, as here, claims of discrimination in compensation are made; (2) the legislative history and administrative interpretations of the Equal Pay Act show plainly that employers were to be permitted to continue recognizing the different risks arising from disparities

in male-female longevity, when computing costs or benefits under retirement plans; (3) the recognition of this differential is thus sanctioned by the standards of the Equal Pay Act; and, therefore, (4) it must also be permissible under Title VII.

As Judge Kilkenny recognized in his dissent below, this Court in *Gilbert* held, in referring to the same legislative history and Equal Pay regulation as are invloved here, that they constituted the proper interpretation of Title VII and were controlling over a contrary guideline of the EEOC. Indeed, Judge Edward T. Gignoux, in his recent, detailed opinion in *Equal Employment Opportunity Commission* v. *Colby College, supra,* annexed hereto as Addendum B, articulated precisely the analysis summarized above, in dismissing the EEOC's claim of Title VII "discrimination" in the private insurance and annuity plans at issue there.

ARGUMENT

I

TITLE VII DOES NOT PROHIBIT THE RECOGNITION OF DIFFERENCES IN MALE-FEMALE LONGEVITY IN THE COMPUTATION OF RATES FOR RETIREMENT PLANS

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer ". . . to discriminate against any individual . . . because of such individual's . . . sex. . . ." (42 U.S.C. § 2000e-2(a)(1)). The section thus requires a showing of "discrimination".

This Court has repeatedly held that, while prohibited discrimination may arise when persons in the *same* class are dissimilarly treated, it does not arise when persons in *different* classes are treated differently. As the Chief Justice stated for the unanimous Court in *Reed* v. *Reed*, 404 U.S. 71, 75 (1971): "This Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different

ways"—an analysis which is also of direct relevance to claims of "discrimination" under Title VII. *Gilbert* at 133, 145.

The court below in this case compared men and women of the same age in concluding that illegal discrimination had occurred. But the comparison actually concerned persons belonging to *different* classes as to life expectancy, the determinative issue. For, while the respective male and female groups may have been similarly situated in terms of age or employment history, they were not so situated as to the crucial factor—risk of mortality—that must be considered in the computation of rates for a retirement plan, the issue here. It is undisputed that, at every age, women on average have lower mortality rates than men of the same age.

Equality of treatment may be denied as much by application of a single standard to persons unequally situated as by application of different standards to persons equally situated. *See, Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Insurance necessarily requires some differentiation, or "discrimination", among groups in *different risk classes.* (See pp. 5-8 *supra*). To require otherwise would cause grossly unfair treatment of the many insureds who would receive less value for their money in order to subsidize the cost of insuring risks far greater than their own.

This Court in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) and again in *Gilbert* rejected the contention, apparently accepted by the courts below in this case, that any dissimilar treatment of men and women on the basis of differences in risks and costs arising from attributes that may be unique to one of the genders, is prohibited. A criterion to be applied in such instances is whether the dissimilar treatment results from a condition that is "objectively identifiable." If so, such distinctions will not be proscribed, absent a showing that they are "mere pretexts designed to effect an invidious

discrimination against the members of one sex or the other. . . ." (*Aiello* at 496-97, n.20; *Gilbert* at 134-35).

The instant case, no less than *Aiello* and *Gilbert*, involves a distinction based, not upon gender as such, but upon different risks arising from an "objectively identifiable" condition associated therewith: differing male-female longevity. Here, the distinction is objectively identifiable through the use of established actuarial techniques. Males and females are placed in different classes, not because of their gender, *qua* gender, but because statistics indisputably show that at every age women as a group have lower mortality rates than do men of the same age and therefore present a correlatively greater risk of extended longevity.

Contrary to the opinion of the majority below, it is only invidious, or arbitrary and irrational, classifications that are proscribed both by the Constitution (*e.g., Reed* at 75) and by Title VII. As this Court stated in *Griggs* at 429-31 when describing the purpose of Title VII:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group. . . ."
>
> * * *
>
> "What is required by Congress is the removal of *artificial, arbitrary* and *unnecessary barriers* to employment when the barriers operate invidiously to discriminate on the basis of . . . impermissible classification." (emphasis added)

There is nothing arbitrary or irrational in the instant classification. The basis for it can easily be seen from the Tables included in Addendum A hereto. As appears there-

from, the women, as a result of their lower mortality rate, live many more years and therefore require many more payments over their lifetimes than the men of the same age. (See pp. 7-8 *supra*). Basic common sense therefore dictates that, if the plan is to remain solvent, either sufficient additional money must be contributed for the women, or the women must be paid their benefits at a lower periodic rate than the men. To recognize this undeniable fact is neither arbitrary nor irrational. To ignore it, is both arbitrary and irrational.

Nor does the recognition of the difference in male-female longevity in any way constitute a "mere pretext" (*Gilbert* at 134-35) to effect invidious discrimination against women or men. To the contrary, by taking into account the differences in risks and costs arising from this mortality differential, equitable treatment is obtained for all individuals. (See pp. 5-7, *supra*). Since it is actuarially established that women as a group live longer than men of the same age, it is entirely appropriate to group them with their counterparts of the same life expectancy, whether they be male or female.*

Compounding the foregoing errors, the courts below attempted throughout their opinions to force a rule which is aimed at protecting the employment rights of individuals, upon an insurance context, where groups, not individuals, are the essential component. This is perhaps nowhere more

*The absence of any gender-directed discrimination in this approach is immediately apparent from its application in many private insurance plans. Thus, in individual annuities, women may either pay somewhat higher premiums or receive lower periodic benefit payments than do men of the same age, but, in individual life insurance, men, for the same reason—greater female longevity—either pay somewhat higher premiums or receive lower death benefits than do women of the same age. The mortality data thus affects both sexes in the same fashion. Far from establishing any discrimination "against" one sex or the other as is proscribed by section 703(h) of Title VII, it proves that there is discrimination against neither.

clearly spelled out than in an Opinion of the Attorney General of the State of Washington (A.G.O. 1973, No. 21 (October 11, 1973)). There, it was determined that a state statute banning sex discrimination in insurance policies did not prohibit the sale of insurance which established different rates for males and females, based upon the differences in male and female life expectancy. The Opinion stated (p. 6):

> "The problem presented . . . has few parallels in the heretofore decided civil rights cases because ordinarily civil rights, like constitutional rights, belong to individual persons and not to classes of persons. Generalities about the class of persons to which the complainant belongs are usually immaterial to his or her rights under a civil rights statute, even if these generalities are true.
>
> * * *
>
> "Insurance, however, is something which by its very nature applies to classes of persons. Its function is to reduce *individual* risk by lumping persons together in classes, all members of the class then sharing the cost of the total risk of the class. A realistic application of a civil rights statute to insurance must, therefore, deal with the class characteristics of the insurance industry, and since most of decided cases dealing with civil rights take an 'individualistic' approach, they are thus of little assistance in resolving the present question." (Emphasis in original)

The "individualistic" approach, in short, is not realistic in its application to an insurance context. Previous cases which have found instances of improper "sex-stereotyping" have all involved circumstances where the capabilities of individuals could be tested individually. The court below

recognized the crucial significance of this factor. In referring to its earlier decision striking down a practice of a blanket refusal to hire woman for positions which entailed long hours of work and heavy physical effort, the Ninth Circuit stated (553 F.2d at 586):

> "An important basis of our decision was the fact that each individual woman applicant could actually be tested to see whether the relevant characteristic of strength was or was not in fact lacking."*

While it *can* and, therefore, must be determined whether a woman can lift a 40-pound weight or whether a man possesses the qualifications to be an airline cabin attendant, it *cannot* be determined in advance—which is the point at which an insurer must determine a rate of contribution and/or commit to a rate of payment—how long a particular man or woman will live. Individual "testing" for purposes of insurance or annuities, that is, forecasting years in advance when a particular person will die, is simply impossible. Again, the court below recognized precisely this (553 F.2d at 586):

> "[T]his characteristic [longevity], unlike those in the prior cases, is impossible to determine on an individual basis at the time when the contributions must be made."

*This same availability of individual testing has also been present in cases where this Court has found overbroad and arbitrary classifications. *E.g., Craig* v. *Boren*, 429 U.S. 190 (1976) (presumed that all females aged 18 were capable of drinking 3.2 beer while any male of the same age was not); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) (presumed that all widows required the financial assistance of survivors' benefits but that any widower did not); *Reed* v. *Reed, supra* (presumed that all male members of the military provided the principal financial support of their dependents, but that any female member did not); and *Stanton* v. *Stanton*, 421 U.S. 7 (1975) (presumed that all males required parental financial support until the age of 21, but that any female under 21 did not). In each of these situations, the presumptions under the statutes would not necessarily have any basis in fact. And, again of crucial importance, it was possible to determine on an individual basis the relevant requirements or capabilities of the persons involved.

Indeed, this Court has already considered and rejected exactly the same sort of unrealistic arguments that respondents urged upon the lower courts herein. In *Gilbert*, the respondents also argued for the application of an "individualized" analysis, even in an insurance context. In so arguing, the respondents there relied in part upon the District Court decision in *this* case. They argued that the rationale of the District Court here was properly applicable to retirement plans, stating:

> "[W]e believe that imposing on employees either unequal costs when benefits are equal or unequal benefits when costs are equal violates the right of each individual employee to be treated equally with each individual employee of the opposite sex without attributing to either the benefits or detriments of an average based on one sex as a group. . . ."*

The respondents' argument in *Gilbert* thus paralleled the rationale adopted by the court below in this case as to the alleged requirement for individual treatment. Referring to the quoted argument, however, this Court in *Gilbert* characterized it as the sort of "no-win" situation (429 U.S. at 140, n.18), which could not furnish the basis for a claim of improper "discrimination."

Insurance by its nature requires reference to groups. Accordingly, measurements as to the existence of alleged discrimination or discriminatory impact in an insurance context should be made by reference to groups, not to individuals. This was confirmed, we believe, by the opinion of this Court in *Gilbert*, the one decision of which we

*Supplemental Brief for Respondents on Reargument at 59, in *Gilbert*.

are aware in which this Court has considered alleged discrimination in the context of a private insurance system. *Gilbert,* in turn, followed the rationale articulated in *Aiello* concerning the state disability insurance plan at issue there.* The plaintiffs in both *Gilbert* and *Aiello* had claimed that the disability insurance plans at issue were unlawfully discriminatory because the plans excluded coverage of disabilities related to pregnancy while including all others. In rejecting those claims this Court stated (*Gilbert* at 138):

> "[W]e start from the indisputable baseline that '[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes.'"

This Court found (*id.*) that the benefits of the program therefore did not operate

> "'. . . to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program,'."

Accordingly, in a particularly important passage, this Court held (*id.*):

> "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme. . . ."

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*See, *Turner* v. *Dept. of Employment Security,* 423 U.S. 44 (1975), wherein this Court specifically contrasted the individualized approach with the principles which must control in an insurance context. There, following traditional individualized analysis, this Court invalidated part of the Utah employment compensation system because it withheld unemployment payments to all pregnant women during an 18-week period, even though their capacity to work could be determined on an individual basis. In so holding, the Court made clear that the case did not concern "coverage limitations or insurance principles central to *Aiello*" (*Id.* at 45).

Application of this analysis to the circumstances presented in this case confirms the absence of any Title VII violation. As Judge Kilkenny noted in his dissent upon rehearing in this case (553 F.2d at 596), the "fiscal and actuarial benefits" of this plan accrued to members of both sexes. The "aggregate risk protection" accorded to the women in fact exceeded that accorded to the men, as a result of the greater contributions made on behalf of the women than the men. Perhaps most importantly, the package was not "worth more to the men than to the women." Actually, the reverse was true, since the women, having had more contributed by the employer on their behalf, would reach retirement with benefits worth more than those for similarly situated men and, in the aggregate, would also receive more than the men. The court below found "discrimination" by looking at only half of the equation—that is, that the female employees paid somewhat more in contributions to the plan than did their male counterparts. The majority simply ignored the fact that, while the women paid more, they also received more in value.

The rationale followed by the majority was, as Judge Kilkenny recognized in his dissent, directly contrary to the reasoning of this Court in *Gilbert.* There, this Court made clear that, so long as an employer provided insurance of equal value to men and women, there was no requirement under Title VII that payment must also be made for an extra risk (there, pregnancy; here, longevity) which may be presented by one sex. This Court reasoned (429 U.S. at 139, n.17):

> "If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance,' there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks

> would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy."

The Court continued (*id.*):

> "[T]he ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not, in either case, require the employer to pay that incremental amount."

So here. The employer would not have "discriminated" among its employees if it had provided no pension plan at all or had paid equal amounts on behalf of all employees, male and female. This would give rise to equal dollar accumulations prior to retirement and benefits of equal actuarial value for all employees upon retirement. Similarly, there could be no such claim if the employer had increased the salaries of all its employees, male and female, by equal amounts rather than contributing those amounts to the retirement plan, or had paid those amounts to the employees upon retirement in a single sum. In each of those events, a female employee who wanted to purchase an annuity paid at the same periodic rate as to a male of the same age would have to pay more than the male, in light of the extra risk arising from the longer female life expectancy. But, as stated in *Gilbert*, "Title VII's proscription on discrimination does not . . . require the employer to pay that incremental amount." (*id.*)

This Court specifically rejected in *Gilbert* any contention that social policy requires that an employer must provide greater value to members of one sex than to members

of the other, in order to avoid a claim of "discrimination" (429 U.S. at 139, n.17):

> "The District Court was wrong in assuming, as it did, 375 F. Supp., at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.' "

The decision of the majority below, while ostensibly aimed at eliminating supposedly over-broad generalizations, would have precisely the opposite effect. Ironically, for all their emphasis on individual treatment, the majority would have petitioners ignore the one most important fact in the entire controversy—that women as a group outlive men—and instead require that petitioners treat men and women less individually by presuming inaccurately that their expected life spans are identical. Petitioners would be forced to forego reliance upon a fact (as a group, women of any age live longer than men of the same age) that is demonstrably true and to resort to an assumption (women and men of the same age have equal life expectancy) that is demonstrably false.

The undisputed fact is that, because women as a group live more years than men of the same age and therefore require a greater number of benefit payments, it will cost more to provide any given amount of periodic retirement income to women than to men. This additional cost would continue to exist even if so-called "unisex" tables were adopted merging, or "averaging", the differing mortality rates of men and women. Adoption of such tables would not change the fact that women on average *do* live longer than men. Many more women than men would continue to sur-

vive each year, and, accordingly, many more periodic payments would continue to be made to them than to the men.*

If, as under "unisex", equal amounts were contributed by and on behalf of both men and women, the employer or insurer would be forced to take some of the funds contributed by and for the men and pay those funds to the women. Otherwise, the plan would exhaust the funds accumulated by and for the women before all of the women had died. This would be discriminatory in the extreme and would violate every concept of equity. As Judge Kilkenny noted in his dissent below (553 F.2d at 598, n.4):

> "[T]he available writing on the subject would indicate that the use of unisex life tables in connection with pension plans would not result in equal treatment, but rather in unjustifiable discrimination. U. S. Commission on Civil Rights, Civil Rights Digest [Winter 1977, pp. 45-6]."**

"Unisex" would in fact create a discrimination of the sort which this Court has already determined to be patently unconstitutional. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). There, this Court invalidated a program granting survivors' benefits, based on earnings, to widows, but not to widowers. Noting that Social Security taxes had been deducted from the salary earned by the deceased wife of the plaintiff, Mr. Justice Brennan (at 645) described the particularly "pernicious" result of the program:

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*As appears from Table 5 in Addendum A hereto, if "unisex" were applied to the TIAA-CREF system, a group of 100,000 women annuitants retiring at age 65 would require over the course of their lifetimes a total of almost *$3 billion* more than a like group of men during their lifetimes, assuming the same sized periodic annuity payments as shown.

**For a detailed discussion of the unfairness of "unisex" see Lautzenheiser, "Sex and the Single Table," Employee Benefits J. (Fall 1976). This analysis is now included on the syllabus of required reading for those attempting to pass the examinations required for accreditation by the American Society of Actuaries.

> "Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. . . ."

See also Califano v. *Goldfarb*, 430 U.S. 199 at 206 (1977).

The quoted observation was made, as noted, in the context of the Social Security system, a system of income transfers in which individual equity plays almost no part. The observation applies with even greater force to private insurance and annuity systems, where individual equity is essential.* Under "unisex", monies would be deducted from the salary checks of the men in order to contribute to a fund that would be used to make payments not to them, but to the women. Earnings would be taken away from men, simply because they are men, and given to women, simply because they are women, and for no other reason. "Unisex" would be no more than a sham, disguising the real discrimination it would create.**

**See, Fleming* v. *Nestor*, 363 U.S. 603, 610 (1960) ("[T]he noncontractual interest of an employee covered by the [Social Security] Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments."); and *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 647 n.14 (1975) ("[I]ndividual equity . . . accords benefits commensurate with the contributions made to the system. . . .")

**Some proponents of "unisex" have suggested that such a scheme should be mandated because the ages of death of men and women aged 65 may be matched and an "overlap" of approximately 80 percent will arise. Not only is any such comparison a misleading use of statistics because (a) it fails to match all of the members of the two groups in the order in which they die (and retirement benefits cease) and (b) it ignores the cumulative payments made to all the members of each group to that [illegible] (see p. 8, *supra*), but it really establishes nothing more than any [illegible] groups in different risk classi-

Even if it were concluded that recognition of the differing male-female mortality rates somehow constituted "discrimination" (and it does not), it would be fully justified in insurance by the fundamental necessities of that business. A practice claimed to violate Title VII may be justified, as this Court only recently confirmed, under the doctrine of business necessity. *International Bro. of Teamsters* v. *United States*, 97 S.Ct. 1843, 1855, n.15 (May 31, 1977) (A Title VII plaintiff must establish an invidious "impact" which "fall[s] more harshly on one group than another and cannot be justified by business necessity"). *See also, Griggs* at 431 ("The touchstone is business necessity.")

As discussed, insurance and retirement plans, by nature, depend upon groups, and the continuing viability of such plans requires application of principles of risk classification. Equitable treatment, as previously noted, is required by law for insurers such as TIAA-CREF. It is also essential to the financial stability of any insurance plan. History has repeatedly demonstrated the dismal results of systems that failed to accord equitable treatment.* And, reference need only be made to the increasing number of reports of the precarious financial position of numerous private and public

fications may be "overlapped". For example, the dates of death of a group of women aged 65 may be matched with those of a group of *women* aged 60, giving rise to an "overlap" virtually identical to that which appears when groups of men and women aged 65 are compared. Such an "overlap" proves the speciousness of this entire approach, since it would lead to the illogical and unworkable conclusion that women aged 60 must be paid benefits at the same rate as women aged 65. "Unisex", in short, would make no more sense than "uniage."

*This was graphically demonstrated, for example, in the early days of insurance with the collapse of insurers which followed a method of risk sharing known as "Assessment Insurance." This method developed in England during the last century when it was assumed the fairest way to operate an insurance pool was to charge each insured an equal rate, regardless of age and sex. The rate was calculated annually in light of the actual death benefits of members of the pool and assessed pro-rata among the survivors. The result was that, while persons in poor health entered and stayed in the pool, those persons

retirement systems, to understand the necessity of accurate actuarial data and projections.*

In summary, the courts below erred in concluding that petitioners had effected an invidious and unjustified discrimination or discriminatory impact against women in violation of Title VII.

II.

THE BENNETT AMENDMENT IN TITLE VII REQUIRES APPLICATION OF EQUAL PAY ACT STANDARDS TO THIS CASE AND THOSE STANDARDS SANCTION THE RECOGNITION OF DIFFERENCES IN MALE-FEMALE LONGEVITY IN COMPUTING RATES FOR RETIREMENT PLANS.

The majority of the panel in the Ninth Circuit on rehearing adhered to its initial conclusion of "discrimination",

in good health, realizing that such an arrangement was inequitable and to their disadvantage, avoided it. Similarly, persons of advanced age with a correspondingly higher risk of dying stayed in the pool, and younger persons avoided it. The withdrawal from and avoidance of the pool by the better risks resulted, in turn, in higher rates of claims and premiums. Eventually, the premium rates were so high that the remaining members of the pool could not afford them, and the insurance scheme collapsed.

The early Fraternal societies set up in this country during the early 19th and 20th centuries, often by immigrant groups, experienced a similar development. In these Societies, the premiums paid by the older members were, typically, not sufficiently greater than those of the younger members to carry the greater risks of such matters as, for example, burial expense. The Societies were therefore often forced to resort to extra assessments of the remaining members to cover the excess costs, tending to drive out the younger members and increase the burden on the members remaining. This, in many cases, caused the insolvency of the Societies. *T. O'Donnell*, History of Life Insurance In Its Formative Years, (1936).

**See, for example:* Ehrbar, *Those Pension Plans are Even Weaker Than You Think, Fortune* magazine, Nov. 1977, pp. 104-114 (industrial pension plans reported to be underfunded by at least $50 billion); *Rail Pension Fund Said to Face Possibility of Depletion by 1986, New York Times*, Nov. 7, 1977, p. 55, c.1 (Railroad Retirement System reported to have insufficient funds to continue to meet required pension benefits); and U.S. Civil Service Commission, Annual Report, 1974, p. 4 (United States Civil Service pension system underfunded by $77 billion as of 1974).

despite the Bennett Amendment, which excludes compensation practices permitted under the Equal Pay Act from the proscription of Title VII, and the holding of this Court in *Gilbert* as to the import of that section. It was because of this adherence that Judge Kilkenny reversed his earlier concurrence and filed his sharp dissent on rehearing. As the following analysis will show, Judge Kilkenny was correct.

A. The Bennett Amendment

The Equal Pay Act (29 U.S.C. § 206(d)) was enacted in 1963 by the 88th Congress in order to ensure equal pay for equal work for both men and women. In so doing, Congress included express exceptions intended to permit employers to continue recognizing certain kinds of differentials including, as will appear, the difference in insurance risks and costs arising from disparities in male-female longevity. The same Congress enacted Title VII in 1964. Conscious of the potential for conflict between application of the exceptions in the Equal Pay Act and the proposed inclusion of sex within the proscription of Title VII, Congress was careful to include an additional sentence in Section 703(h) of Title VII to reconcile any such conflict. That sentence provides:

> "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act]".

This provision, generally known as the "Bennett Amendment," thus manifests the plain intent of Congress to provide that any possible conflict between the require-

ments of Title VII and of the Equal Pay Act, in situations where both apply, is to be resolved in favor of the Equal Pay Act. The Bennett Amendment was adopted by the Senate on June 12, 1964 (110 Cong. Rec. 13647), two days after the Equal Pay Act, passed by the same Congress in its first session, had become effective. In explaining his Amendment to Title VII at the time it was offered, Senator Bennett stated on the Senate floor (110 Cong. Rec. 13646):

> ". . . last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
>
> "By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.
>
> "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified."

Senator Humphrey, the floor manager of Title VII, also indicated his understanding that the Amendment was designed to permit differences in the treatment of males and females under benefit plans. The following exchange reveals Senator Humphrey's advice to the legislators (110 Cong. Rec. 13663-64 (1964)):

> "MR. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [MR. HUMPHREY], who is the effective manager of the pending bill, a clarifying question on the provisions of Title VII.

> Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?
>
> MR. HUMPHREY. Yes. That point was made unmistakeably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it."

Senator Dirksen, minority leader when the Bennett Amendment was passed, confirmed the congressional intent, when he stated during the debate on that bill, (110 Cong. Rec. 13647 (1964)):

> "We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carried certain exceptions. All that the pending amendment does is recognize those exceptions, that are carried out in the basic act."

The following year, on July 11, 1965, shortly before Title VII was to become effective, Senator Bennett reiterated the purpose of his earlier amendment in order to ensure that no misunderstanding would exist as to its meaning. He then stated in the Senate (111 Cong. Rec. 13359 (1965)):

> "Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act."

The language of the Bennett Amendment thus is mandatory: "It *shall not* be an unlawful employment practice

for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid. . . ." (emphasis supplied) where the differentiation is authorized by the Equal Pay Act. Practices permitted under the Equal Pay Act exceptions are permitted under Title VII. And, it is not only the express statutory provisions of the Equal Pay Act that govern in instances of overlap with Title VII. The administrative interpretations of the Equal Pay Act must also prevail. This Court left no doubt in this regard in *Gilbert*. There, Mr. Justice Rehnquist, speaking for the majority, stated (429 U.S. at 144):

> "Because of this [Bennett] amendment, interpretions of § 6(d) of the Equal Pay Act are applicable to Title VII as well. . . ."

Indeed, it would be patently anomalous to urge that Congress had deliberately and specifically incorporated the standards of the Equal Pay Act into Title VII, yet had delegated the interpretation of those identical standards to one agency for purposes of the Equal Pay Act itself and to another for Title VII.*

In short, there can be no dispute that, in enacting Title VII, Congress foresaw that conflicts could arise in the application of that statute and the Equal Pay Act exceptions. By including the Bennett Amendment in Title VII, Congress provided a statutory method of reconciling any such conflicts: interpretations of the Equal Pay Act were to control. Judge Gignoux put it succinctly in *Equal Em-*

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*As one commentator has observed:

> "It might be argued, that the Bennett Amendment is not directed at conflicts between the two statutes so much as the conflict of interpretations between the Wage-Hour Administrator and the Equal Employment Opportunity Commission." Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62, at 76 n.26 (1964).

ployment Opportunity Commission v. *Colby College, et al.*, annexed as Addendum B hereto (pp. 6-7):

> "Both the language of the Bennett Amendment and its legislative history disclose the plain intent of Congress to avoid subjecting employers to two conflicting standards, those of Title VII and those of the then recently enacted Equal Pay Act, and to provide that any possible conflict between the requirements of Title VII and of the Equal Pay Act is to be resolved in favor of the Equal Pay Act."

Such analysis, as Judge Kilkenny recognized in his dissent upon rehearing below, has direct application here.

B. The Equal Pay Act

The Equal Pay Act, as noted, was intended to ensure that all employees, male or female, received equal pay for equal work. In passing this Act Congress, however, expressly provided that not every disparity in compensation was to be prohibited. Section 6(d)(1) of the Equal Pay Act provides in part that no employer shall discriminate:

> ". . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work . . . except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex. . . ."

In the retirement plan here the amount of contributions on behalf of the women actually exceeded those on behalf of the men, because of the greater cost for the female benefits. Thus, as these contributions are part of wages,*

*See, Wage and Hour Opinion Letter No. 1117 (WH-70), August 25, 1970; CCH Lab. L. Rep. Transfer Binder W-H Adm. Rulings, March 1969-June 1973, ¶30,681.

it cannot be said that petitioners were paying compensation to the female employees "at a rate less than that at which" the male employees were paid. Respondents' complaint is that, while the employer paid a greater amount for women than for men toward a large portion of the pension costs, the women, too, contributed more than did the men toward the remaining portion of the costs, also as a result of the disparity in risks and costs arising from the difference in male-female longevity. A review of the legislative history and administrative interpretations of the Equal Pay Act removes any possible doubt that recognition of such a differential in risks and costs is permissible.

1. Legislative History

The Equal Pay Act specifically excepts from its provisions any differential in wages based "on any other factor other than sex" (29 U.S.C. § 206(d)(1)(iv)). The legislative history of the Act demonstrates beyond question that differences in insurance or annuity rates resulting from the disparity in mortality risks is precisely the sort of "differential" intended by this provision.

In the original subcommittee version of the bill, the sole exception to the equal pay rule would have permitted differentials between males and females only when based upon a "seniority or merit increase system."* All the organizations which testified against the bill at the Senate and House hearings in March and April 1963, however, raised the objection that it cost more to employ females than males, and that these added expenses were a proper jus-

*Section 4(a) of H.R. 3861, printed in Hearings on H.R. 3861 and Related Bills, before the Special Subcommittee on Labor of the House of Representatives, 88th Cong., 1st Sess. (1963) (hereinafter "Hearings-House", at 3); Section 4 of S.882, and §4(a) of S.910, printed in Hearings on S.882 and S.910, before the Subcommittee on Labor of the Committee on Labor and Welfare, United States Senate, 88th Cong., 1st Sess. (1963) (hereinafter "Hearings-Senate"), at 2, 6.

tification for wage differentials. *See* Hearings-House at 96-98, 102-04, 137, 146-47, 158, 184-86, 189, 194, 241-44, 251-52 and 255-57; Hearings-Senate at 114, 130, 134-35 and 141-50. One of the specific examples cited as an increased cost to employ female workers was the additional cost of providing retirement benefits due to greater female longevity. Hearings-Senate, at 142 and 145; Hearings-House, at 103, 184-86 and 241.

As a result of these observations, the bill, as reported out of the Committees in both Houses of Congress, included a new provision that exempted from the requirement of equal pay "a differential based on any factor other than sex", thus giving recognition to the differential in employment costs arising from differences in male-female longevity.* The Senate Report (No. 176) on the bill specifically noted the longevity problem at issue here:

> "During the course of the hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women which they do not encounter in the employment of men . . . Some employers stated that the cost of their pension and welfare plans were higher for women than men . . . because of the longer life span of women in pension benefits."**

The Report then stated that such differences in cost would constitute a "factor other than sex" justifying a differential in wages (*id.*).

*H.R. 6060, quoted in H.R. Rep. No. 309, 88th Cong., 1st Sess., 7 (1963); S.1409, quoted in S. Rep. No. 176, 88th Cong., 1st Sess., 6 (1963).

**An employer's cost is necessarily greater for women than for men, where the periodic annuity payments made to both are equal, since, given the greater female longevity, more periodic payments will have to be made to the women than to the men. Conversely, an employer's cost for life insurance providing equal death benefits to men and women would be greater for men than for women.

In short, the legislative history shows that Congress intended to continue to permit differentials in pension rates resulting from the differences in male-female longevity.

2. Administrative Interpretations

The administrative interpretations of the Equal Pay Act, consistent with its legislative history, clearly permit computation of rates for retirement benefits based upon mortality tables that reflect the differing male-female longevity. The Department of Labor is the governmental entity given jurisdiction over enforcement of the Equal Pay Act, and the Wage and Hour Administrator of that Department is charged with enforcing it.

Even before the Equal Pay Act became formally effective in June 1964, the Wage and Hour Administrator had addressed the subject question. In an Opinion issued on May 27, 1964, the Administrator ruled that equal employer contributions to an insurance plan would not violate the Equal Pay Act even though unequal periodic benefits may result.* Less than a year later, on January 22, 1965, the Administrator again addressed the issue and ruled that employee benefit plans met the requirements of the Act if either the employer's contributions or the periodic benefit payments to employees were equal.** And, in September

*Specifically, this Opinion in part stated:

> "It is our opinion that equal insurance premium payments by the employer on behalf of male and female employees would not result in any violation of the equal pay provisions regardless of difference in benefits."

Wage and Hour Opinion Letter, No. 257, May 27, 1964; [1961-1966 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,851.

**There, the Administrator stated in part:

> "The Divisions have taken the position that where benefits such as insurance are furnished to employees by the employer and the actual amount of payments made or costs incurred

1965, when the Wage and Hour Administrator issued formal interpretative regulations under the Act, the matter was specifically covered in a regulation that this Court in *Gilbert* subsequently found to support ". . . what seems to us to be the 'plain meaning' of the language used by Congress when it enacted . . ." Title VII (429 U.S. at 145). Following the rationale of the earlier Wage and Hour Opinions, this regulation, 29 C.F.R. § 800.116(d) (1976) provided:

> "If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees."

In short, the Wage and Hour Administrator from the outset recognized the reality that any retirement plan must face: given the universally acknowledged longer average life span for women as compared to men, either (a) more money will have to be contributed for the women in order

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by the employer on behalf of men and women employed on equal work are equal, the fact that benefits are unequal will not result in a prohibited wage differential. Also, if the benefits provided by such a plan are equal, the fact that payments made on behalf of men and women are unequal will not be considered a violation of the equal pay provisions."

Wage and Hour Opinion Letter, No. 336, Jan. 22, 1965; [1961-1966 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,945.

to pay periodic benefits at the same level as to men of the same age, or (b) the benefits will have to be paid to the women at a somewhat lower periodic level than to the men. The Administrator thereby continued to permit the flexibility needed if viable retirement plans are to be fashioned for a variety of contexts—from higher education, where, for example, employee mobility may be essential to career advancement, to private industrial plans where other factors may be more important.

The same approach has been followed by every other administrative agency with authority over this area*, except, as will be discussed, the EEOC. Each of these agencies, except the EEOC, have recognized that the same total amount of money simply cannot be paid out in the same periodic amounts over different periods of time.

The Wage and Hour Administrator reiterated the plain import of the above quoted regulation in two subsequent Opinions, one on August 25, 1970 and another on April 26, 1973. In the August 1970 Opinion, the Administrator confirmed that matters relating to retirement plans were covered by the Equal Pay Act and ruled:

> "This is in further reference to your letter in which you inquired about the application of the equal pay provisions to the amounts an employer contributes toward a retirement or pension plan in behalf of his employees.
>
> * * *
>
> ". . .[W]here the employer's contributions to such a plan are equal for both men and women, no wage differential prohibited by the equal pay provisions

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*Office of Federal Contract Compliance, 41 C.F.R. § 60-20.3(c) (1974); Department of Health, Education and Welfare, 45 C.F.R. § 86.56(b) (2) (1975).

> will result from such payments, even though the benefits which accrue to the employees in question may be greater for one sex than for the other."*

The April 1973 Opinion again repeated the same approach and also rejected any suggestion that the Department of Labor intended to follow the contrary approach which, by then, had been set forth in a contrary guideline of the EEOC (see *infra*).**

In short, the Department of Labor has consistently and correctly interpreted the Equal Pay Act as permitting employers to recognize the differing costs of providing retirement benefits for men and women. Plainly, if the instant plan, like those managed by TIAA-CREF, had provided for equal contributions by and on behalf of men and women, it would have been sanctioned under the Act. *Equal Employment Opportunity Commission* v. *Colby College, et al.,* included as Addendum B hereto. In this case, as noted, the employer actually contributed a greater

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*Wage and Hour Opinion Letter No. 1117 (WH-70), Aug. 25, 1970; [1964-1973 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,681.

**In the April 1973 Opinion, the Administrator stated:

> "Specifically you ask: 'If an employer makes equal contributions to a retirement plan covering male and female employees but if, as a result of separate actuarial tables used by the plan's administrators, the female employees, other things being equal, receive smaller monthly retirement benefits, is the employer in violation of the equal pay provisions?'
>
> "In response to your initial question, our opinion letter of August 25, 1970 [W & H Opinion Letter No. 1117], sets forth our current position under the Equal Pay Act. We are cognizant of the recent amendments to the Civil Rights Act and the Guidelines issued by Equal Employment Opportunity Commission (EEOC) on pension benefits and we will continue to watch developments in this area. However, we do not anticipate any change in our position in the immediate future.

Wage and Hour Opinion Letter No. 1276 (WH-224), April 26, 1973; Lab. L. Rep. (CCH) ¶ 39,874.

amount on behalf of women than men. The majority of the Ninth Circuit nevertheless concluded upon rehearing that this plan was not sanctioned, because it involved unequal employee contributions corresponding to the unequal costs. While this holding thus would not apply to the plans managed by TIAA-CREF, the holding, we suggest, is illogical and ignores the underlying rationale of the regulation and other applicable interpretations of the Department of Labor under the Equal Pay Act. As Judge Kilkenny put it in his dissent below (553 F.2d at 597):

> "This regulation [29 C.F.R. § 800.116(d) (1976)], as I read it, contemplates the actuarial equivalent of the scheme before us. If employer contributions are equal for men and women, there is no statutory violation even though the resulting benefits are not equal as between men and women. The majority fails to appreciate the significance of this. In the context of pension plans, this rule makes sense only if it is read to impliedly authorize the funding of employee pension plans upon the basis of separate mortality tables. This regulatory justification for a plan with equal contributions and unequal benefits cannot be ignored in the variation before us."

In reaching its conclusion on rehearing, the majority (553 F.2d at 593-94) relied upon an Interpretative Bulletin which the Wage and Hour Administrator had published in February 1966 (29 C.F.R. § 800.151). The Bulletin also was urged upon this Court in *Gilbert* as controlling over 29 C.F.R. § 800.116(d) (1976).* This Court rejected that argument in *Gilbert,* and it has no greater

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*Supplemental Brief for Respondents on Reargument at 40, in *Gilbert.*

application here. Indeed, as Judge Kilkenny noted (553 F.2d at 597), the "vitality" of the Bulletin was questionable in any event after *Gilbert*. Moreover, the purport of the Bulletin was obviously not meant to relate to questions concerning rates under insurance or retirement plans, which questions were encompassed specifically by 29 C.F.R. § 800.116(d) and by the subsequent August 1970 and April 1973 Opinions of the Wage and House Administrator, both of which were issued *after* the February 1966 Bulletin had been published.

C. **EEOC Guidelines**

The legislative history of Title VII is devoid of any suggestion that Congress intended in 1964 that that statute would touch upon the use of mortality tables reflecting differences in male-female longevity. Indeed, as this Court has noted, the legislative history of Title VII's proscription against discrimination by sex is, except for the Bennett Amendment, "notable primarily for its brevity." (*Gilbert* at 143). Such a suggestion of Congressional intent would, in fact, be contrary to subsequent indications. For example, the Pension Benefit Guarantee Corporation, the agency established by Congress to insure pension plans under its recent pension reform legislation* has already expressly provided in an interim regulation for the use of precisely such data based mortality tables in the evaluation of retirement plan benefits. *See*, 41 Fed. Reg. 48484-91 (1976).**

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*Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 93-406, 88 Stat. 829.

**The Federal tax laws also continue to use actuarial tables that recognize the difference in male-female longevity in the computation of annuity income resulting in different periodic tax burdens as between men and women. I.R.C. § 72(c)(3)(a); Treas. Reg. § 1.72-9, T.D. 6233 (1957).

An initial question therefore exists as to whether the issue of alleged "discrimination" in the use of the subject mortality tables was ever intended to be covered in any fashion by Title VII. There is even a greater question as to whether the EEOC had authority to issue any regulations on this subject. As is stated in *Gilbert*, "Congress, in enacting Title VII, did *not* confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title." (429 U.S. at 141; emphasis supplied). The EEOC was only given authority from time to time to issue "procedural" requirements (*Gilbert*, id., n.20).

Whatever may be the status of the EEOC's guidelines, however, that agency initially recognized the primacy of the Equal Pay Act and the Wage and Hour Administrator's interpretations as applicable to Title VII. On November 22, 1965, almost immediately after Title VII had become effective, the EEOC issued a guideline (29 C.F.R. § 1604.7(b) (1965)) which, under the heading, "Relationship of Title VII to the Equal Pay Act," stated in part:

> "(a) Title VII *requires* that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, *the Commission interprets section 703(h) [The Bennett Amendment] to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.*
>
> * * *
>
> (b) Accordingly, the Commission *will* make applicable to equal pay complaints filed under Title VII

> the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. . . . Relevant opinions of the Administrator interpreting 'the equal pay for equal work standard' *will* also be adopted by the Commission." (Emphasis supplied.)

This guideline confirmed the position that had been enunciated by the EEOC's own General Counsel in an Opinion dated October 12, 1965.* Subsequently, in July, 1966, the General Counsel of the EEOC addressed the matter at issue here and, following the approach previously taken by the Wage and Hour Administrator, ruled:

> "The Commission . . . does not feel that an employer commits an unlawful employment practice by contributing to or negotiating insurance programs which provide different benefits for male and female employees based upon reasonable actuarial considerations required by insurance underwriters. Nor does the Commission believe that a violation of Title VII occurs when male and female employees receive the same benefits, but the employer's contributions to the plan differ, depending upon the sex of the employee."**

*That Opinion had stated in part:

> "Section 703(h) [of Title VII] merely incorporates by reference into Title VII the enumerated defenses set forth in the Fair Labor Standards Act (which were added to that Act by the Equal Pay Act of 1963), together with such interpretative rulings thereon as the Wage-Hour Administrator has made or may make. Thus, where there is inequality of compensation pursuant to . . . (4) a differential based on any factor other than sex, such discrimination in payment is permissible under Title VII."

EEOC Opinion Letter (Oct. 12, 1965) [1966] Empl. Prac. Guide (CCH) ¶17,252.09.

**[1966] 401 F.E.P. Rep. (BNA) 3011-12.

For seven years after the enactment of Title VII, the EEOC followed the legislative history and mandate of the Bennett Amendment in adopting under Title VII present and future Equal Pay interpretations, including those discussed above.* Nevertheless, in 1972, the Commission inexplicably issued new, superseding guidelines (29 C.F.R. §1604.8) which, again under the heading "Relationship of Title VII to the Equal Pay Act," stated:

> "(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.
>
> "(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, *but will not be bound thereby.*" (Emphasis supplied.)

And, simultaneously, the Commission, for the first time, announced in other guideline (29 C.F.R., §1604.9(f)):

> "It shall be unlawful employment practice for an employer to have a pension or retirement plan which . . . differentiates in benefits on the basis of sex."

Thus, the EEOC's guidelines, after seven years, attempted to turn 180° on this issue in 1972. Initially, recognizing and accepting the plain import of the Bennett Amendment, the EEOC announced that it would be bound by Equal Pay Act interpretations. ("Title VII *requires*

*As late as 1971 the EEOC stated in a Decision that ". . . § 703(h) [the Bennett Amendment] was intended to ensure consistency in the administration of Title VII and the Equal Pay Act." [1973] EEOC Decisions (CCH) ¶6300.

that its provisions be harmonized with the Equal Pay Act", and that "the Commission *will* make applicable . . ." Equal Pay Act interpretations. (29 C.F.R. § 1604.7(b) (1965) (emphasis added). Seven years later, in patent contravention of the Bennett Amendment, the EEOC announced that, not only would it *not* be bound by such interpretations, but that it was proscribing precisely the same practice that the Equal Pay Act continued to permit.*

In so doing, the EEOC acted inappropriately. It could not properly reverse its mandated compliance with the Bennett Amendment unless Congress had changed the law, which it had not. The law now, as in 1965, is that, where conflict exists between the Equal Pay Act and Title VII concerning alleged discrimination in wages or compensation, interpretations under the Equal Pay Act control. Although Title VII was amended in 1972, that amendment and legislative discussions relating thereto have no bearing on the issues here. This case concerns the provisions and purport of Title VII as it was enacted in 1964. The irrelevance of the 1972 amendments therefore could not have been made any clearer than it was by this Court in *International Bro. of Teamsters* v. *United States*, 97 S.Ct. 1843, 1864, n. 39 (May 31, 1977):

> "[T]he section of Title VII that we construe here, § 703(h) [which contains the Bennett Amend-

*These guidelines, we note, are anything but "procedural", even though that, as discussed *supra*, was the only subject matter authorized by Title VII to be included in regulations. Moreover, even in the promulgation of procedural regulations, the EEOC is required to conform ". . . with the standards and limitations of the Administrative Procedure Act." 42 U.S.C. § 2000e-12(a). No such "conformity" occurred concerning the 1972 guidelines. Indeed, the EEOC has conceded (37 Fed. Reg. 6836; April 5, 1972) that the 1972 guidelines did *not* follow the provisions of the Administrative Procedure Act which require (5 U.S.C. § 553 (1966)) notices of proposed rule makings, and opportunity for public participation, and a delay in the effective date.

> ment], was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII . . . are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls."*

In short, the Bennett Amendment now, as in 1964, requires that interpretations under the Equal Pay Act be applied under Title VII. By refusing to be bound by Equal Pay interpretations and announcing a new guideline directly contrary thereto, the EEOC improperly attempted to write the Bennett Amendment out of Title VII. The EEOC's action thus is even more egregious than the sort of administrative turnabout described by this Court in *Gilbert* (at 142-43). This, when combined with the other patent deficiencies in the EEOC's 1972 guideline (see *infra*), shows plainly that no deference is due to that guideline. *Gilbert* at 142-45; *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86, 94-95 (1973).

D. Effect of *General Electric Co.* v. *Gilbert*

In *Gilbert* the plaintiffs had relied upon a 1972 guideline of the EEOC, stating that it was a violation of Title VII to exclude pregnancy-related disabilities from a disability plan. This Court rejected the plaintiffs' contention. Instead, this Court held that the regulation of the Wage and Hour Administrator discussed above was the proper interpretation of Title VII (429 U.S. at 140-45).

*To the extent that the 1972 amendment to Title VII (which simply extended the coverage of the Act to additional employers and made some procedural changes) has any relevance at all to this issue, it is that the amendment made no change whatsoever in the Bennett Amendment, thus confirming its continuing importance.

In so doing, this Court noted that the EEOC's guideline was neither contemporaneous with Title VII nor consistent with earlier EEOC guidelines on the same subject. In this case, too, the EEOC's 1972 guideline (enacted at the same time as the guideline involved in *Gilbert*) is neither a contemporaneous interpretation of Title VII nor consistent with earlier guidelines of the EEOC. Judge Gignoux put it well in discussing exactly this subject in *Equal Employment Opportunity Commission* v. *Colby College, et al.* After reviewing the background of the EEOC guideline proffered by the plaintiffs in *Gilbert*, Judge Gignoux stated (Addendum B, n.9, pp. 11-12):

> "A similar observation may be made with regard to the Commission guideline on pension or retirement plans at issue in this action, 29 C.F.R. § 1604.9(f). Issued in 1972, the guideline is hardly a coeval interpretation of Title VII, which Congress passed in 1964. Furthermore, the Commission guideline, contradicting as it does the Wage and Hour Administrator's regulation, 29 C.F.R. § 800.116(d), is a substantial departure from the previous guideline issued in 1965 in which the Commission stated it would defer to the Wage and Hour Administrator's interpretations on equal pay questions. 29 C.F.R. § 1604.7(b) (1965)."

A further and even more important reason for this Court's rejection of the EEOC guideline in *Gilbert* was that it "sharply conflicted with other indicia of the proper interpretation of the sex-discrimination provisions of Title VII." (429 U.S. at 143). The "other indicia" were found in the *same* legislative history of the Equal Pay Act and in the *same* regulation of the Wage and Hour Administrator that we have already discussed. Confirming that "be-

cause of this [Bennett] amendment, interpretations of section 6(d) of the Equal Pay Act are applicable to Title VII as well. . . ." (429 U.S. at 144), this Court quoted approvingly the regulation of the Wage and Hour Administrator discussed above (29 C.F.R. § 800.116(d) (1976)) and concluded that it was a proper interpretation of Title VII. *Gilbert* at 145.

Precisely the same rationale applies to the subject issue. Indeed, the regulation discussed in *Gilbert* as applying to pregnancy disability issues has an even clearer application to this case, involving as it does a plan "providing insurance or similar benefits to employees" (29 C.F.R. § 800.116(d) 1976)). Accordingly, the language of this Court (at 145) in dismissing the complaint in *Gilbert* applies *a fortiori* to this case:

> "The EEOC guideline of 1972, conflicting as it does with earlier pronouncements of that agency, and containing no suggestion that some new source of legislative history had been discovered in the intervening eight years, stands virtually alone. Contrary to it are the consistent interpretation of the Wage and Hour Administrator, and the quoted language of Senator Humphrey, the floor manager of Title VII in the Senate. They support what seems to us to be the 'plain meaning' of the language used by Congress when it enacted § 703(a)(1)."

In short, the Court below erred in refusing to follow the plain meaning of the Bennett Amendment and instead relying upon the 1972 EEOC guideline and an administrative decision of the EEOC relating thereto.

Conclusion

As shown, the majority of the court below erred in according substantial deference to a recent guideline of the EEOC. The majority was also incorrect in concluding that an "individualized" approach is required in an insurance context and in holding that it is therefore "discriminatory" in such a context to recognize the conceded differences in male-female longevity. Insurance, by its nature, involves groups and requires recognition of the differing risk characteristics thereof. It is only by recognizing such differences that equitable treatment can be accorded to all insureds and the financial integrity of insurance systems can be ensured. To the extent that the decision of the majority below requires otherwise, the decision should be reversed.

Dated: November 17, 1977

Respectfully submitted,

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ADDENDUM A

TABLE 1

Survival Experience of 100,000 Males and 100,000 Females Retiring at Age 65, Using 1951 Group Annuity Mortality Table

Age	Numbers of Males Surviving	Numbers of Females Surviving	Surviving Females as a Percentage of Surviving Males
65	100,000	100,000	—
70	85,812	91,913	107%
75	67,156	78,574	117
80	45,242	59,049	131
85	24,110	37,100	154
90	9,633	18,309	190
95	2,674	6,280	235

TABLE 2

Aggregate Deaths From 100,000 Retirements at 65 Using 1951 Group Annuity Mortality Table

MALE			FEMALE	
Aggregate Deaths From Age 65 to Date	Aggregate Deaths as Percentage of Initial Population at Age 65	Age	Aggregate Deaths From Age 65 to Date	Aggregate Deaths as Percentage of Initial Population at Age 65
2,442	2%	65	1,360	1%
17,561	18	70	10,210	10
37,036	37	75	24,908	25
59,268	59	80	45,329	45
79,431	79	85	67,067	67
92,299	92	90	84,700	85
98,043	98	95	95,236	95

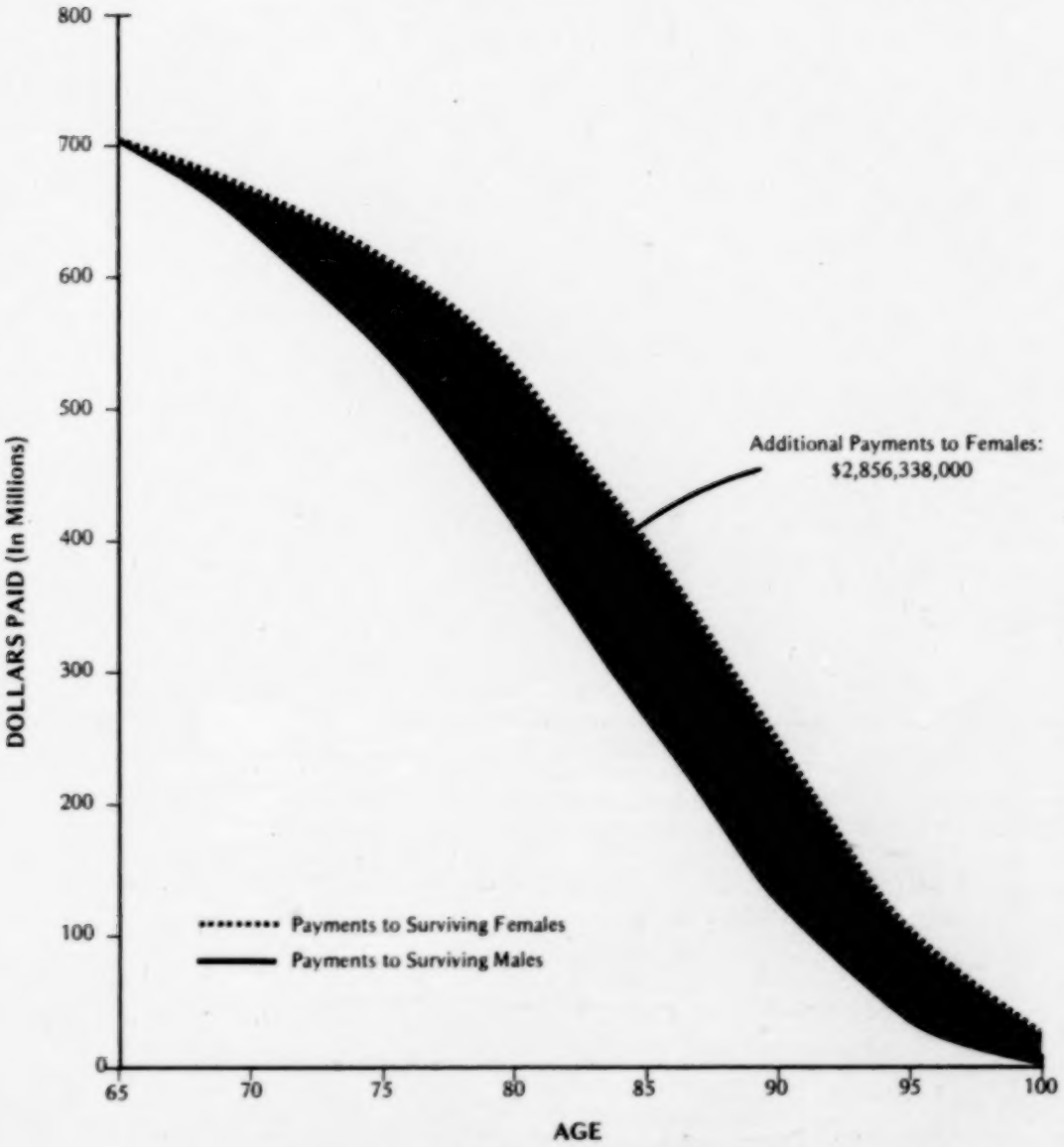
TABLE 3

Total Number of Years Lived by 100,000 Males and 100,000 Females Retiring at Age 65, Using 1951 Group Annuity Mortality Table

	MALES	FEMALES
Total Years Lived	1,470,820	1,759,639

TABLE 4

TOTAL ANNUNITY DOLLARS PAID TO SURVIVING MALES AND SURVIVING FEMALES EACH YEAR UNDER "UNISEX"*, APPLYING MORTALITY DATA IN USE BY TIAA-CREF UNTIL MARCH 1977**



* *100,000 males and 100,000 females retiring at age 65 electing single life annuities, assuming each male and each female would receive $7,000 per year.*

** *A-1974 (1, 2½) Annuity Table.*

ADDENDUM B

United States District Court

DISTRICT OF MAINE

SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* v. COLBY COLLEGE, TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND, *Defendants.*	CIVIL NO. 75-136-SD

OPINION AND ORDER OF THE COURT

GIGNOUX, J.

In this action plaintiff Equal Employment Opportunity Commission (hereinafter "the Commission") alleges that defendant Colby College (hereinafter "Colby") previously has and currently is engaged in unlawful employment practices in violation of § 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII"). Defendants Teachers Insurance and Annity Association (hereinafter "TIAA") and College Retirement Equities Fund (hereinafter "CREF") are named as parties having an interest in the outcome of the litigation pursuant to Fed. R. Civ. P. 19(a). Jurisdiction variously is asserted under 28 U.S.C. §§ 451, 1343(4) and 1345 and § 706(f)(1), (3), (g) of Title VII, 42

U.S.C. 2000e-5(f)(1), (3), (g).[1] In its Amended Complaint the Commission asserts that the periodic retirement annuity and insurance death benefits plans in which Colby and its eligible employees participate and which TIAA-CREF manage impermissibly distinguish between male and female employees on the basis of sex in the disbursement of unequal benefit payments. The Commission prays the Court to enjoin permanently Colby's allegedly discriminatory practices, to award appropriate back pay with interest to those individuals adversely affected by such practices, and to order Colby to institute affirmative action programs providing equal employment opportunities for females.

Presently before the Court pursuant to Fed. R. Civ. P. 56(b) is a motion by defendants Colby, TIAA, and CREF for summary judgment in their favor. The motion is restricted to the legal question of whether § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (hereinafter "the Bennett Amendment"), the Equal Pay Act, 29 U.S.C. § 206(d), the allegedly applicable regulation promulgated by the Wage and Hour Administrator under the Equal Pay Act, 29 C.F.R. § 800.116(d) (1976), and the recent decision of the United States Supreme Court in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), fully dispose of this action as a matter of law in favor of defendants. The issue thus presented has been fully briefed and argued. For the

[1]In addition to providing for the creation of the Commission, 42 U.S.C. § 2000e-4, Title VII empowers the Commission to bring a civil action in a United States District Court of appropriate venue against a party, other than a government, governmental agency, or political subdivision, allegedly in violation of Title VII once extrajudicial means of resolving the purported violation have failed. 42 U.S.C. § 2000e-5(f)(1)(3). Congress in 1972 amended Title VII so as to rescind a provision which formerly exempted the employment activities of nonreligious educational institutions from the scope of Title VII. Act of March 24, 1972, P.L. 92-261 § 3, 86 Stat. 103. Title VII now covers employment practices of nondenominational educational institutions. 42 U.S.C. §§ 2000e(b) and 2000e-1.

reasons set forth below, defendants' motion for summary judgment is granted.

I.

The essential facts are undisputed. Colby is a nondenominational, nonprofit, privately supported educational institution located in Waterville, Maine. TIAA is a nonprofit, legal reserve life insurance company. The Carnegie Foundation for the Advancement of Teaching established TIAA in 1918 to provide retirement and insurance plans for educational institutions and their staff members. Only colleges, universities, independent schools, and similar nonprofit institutions principally engaged in education or research are eligible to participate in TIAA programs. CREF is a not-for-profit corporation created in 1952 through a Special Act of the New York legislature to complement the activities of TIAA. McKinney's 1952 Session Laws, ch. 124. Participation in CREF programs is limited to the same categories of institutions as are eligible for TIAA plans. Some 2800 institutions participate in TIAA-CREF programs.

In 1935 Colby's Board of Trustees voted to enroll the college in a retirement plan managed by TIAA. Under the terms of the arrangement both Colby and its participating employees make contributions to the plan calculated as a percentage of the participant's salary. Colby in 1956 likewise joined TIAA's life insurance program. Similarly situated male and female employees enrolled in the retirement annuity and life insurance plans make precisely equal contributions to the plans, and Colby's contributions to the plans also are exactly equal for similarly situated employees, regardless of sex. The annuity plan permits enrollees at retirement to select one of several options for the repayment

of accumulated funds. The repayment procedures generally involve either periodic benefits for the lifetime of the annuitant alone or periodic benefits for the lifetime of two persons, typically the annuitant and his or her spouse. The life insurance plan provides for decreasing group term coverage for each enrollee to age 70. Thereafter, the annuity benefits are designed to provide the risk protection appropriate for advancing age. Hence, the intent of the insurance plan is to provide dependents of an insured with financial protection in the event of the insured's premature death, whereas the annuity payments are designed to provide the retiree with income for the duration of his or her life.

The aspect of the Colby programs which the Commission challenges is the manner of payment of periodic annuity and life insurance benefits. In calculating the disbursement of annuity and insurance funds, TIAA-CREF utilize two sets of life expectancy tables, one for men and another for women. Actuarial data which TIAA-CREF have compiled show that women enrolled in their annuity and insurance plans consistently enjoy a lower mortality rate than similarly situated males. For instance, TIAA-CREF mortality statistics reveal that at age 65 the life expectancy for male annuitants is 17 years while for female annuitants of the same age the figure is 21 years. Female annuitants at age 65, therefore, can expect to receive their annuity payments for an average of four years longer than their male counterparts. To account for this difference in longevity, the TIAA-CREF managed annuity fund pays women annuitants from Colby monthly benefits which are somewhat less than the monthly payments made to male annuitants. Underlying this practice is the essential proposition upon which the insurance industry operates that the fund from which annuities are paid should not be exhausted until the last annuitant covered by the fund dies. In similar fashion, the TIAA-CREF managed insurance plan pays to

male insureds lower death benefits than to similarly situated women. Because of the higher mortality rate for men, monies from the group term life insurance fund for males are expended at a faster rate than monies from the women's group fund.

The Commission agrees with defendants that because all similarly situated participants make equal contributions to the annuity and insurance funds, and because Colby pays exactly equal amounts into the funds on behalf of each similarly situated participant, all similarly situated annuitants or insureds receive coverage having the same present actuarial value. Where the Commission perceives a violation of Title VII is in the unequal rate at which the annuity and life insurance benefits are paid out. According to the Commission this rate differential simultaneously discriminates both against women with regard to annuity payments and against men with respect to death benefits.

II.

Section 703(a)(1) of Title VII provides in pertinent part that it shall be an unlawful employment practice for an employer

> to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin,

42 U.S.C. § 2000e-(a)(1).[2]

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[2]Although § 703(a)(1) does not specifically refer to retirement plans, it is settled that retirement plans are a condition of employment and fall within the scope of Title VII. *Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976); *Peters* v. *Missouri-Pacific R.R.*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973); *Rosen* v. *Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973); *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

Enacted in 1963 and effective in 1964, the same year in which Congress passed Title VII, the Equal Pay Act provides in pertinent part that no employer shall discriminate

> between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex:

29 U.S.C. § 206(d)(1).[3]

Bennett Amendment, § 703(h) of Title VII, recites in pertinent part:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act].

42 U.S.C. § 2000e-2(h).

Both the language of the Bennett Amendment and its legislative history disclose the plain intent of Congress to avoid subjecting employers to two conflicting standards, those of Title VII and those of the then recently enacted Equal Pay Act, and to provide that any possible conflict

[3]No party to this action disputes that defendants are subject to the terms of the Equal Pay Act.

between the requirements of Title VII and of the Equal Pay Act is to be resolved in favor of the Equal Pay Act. During the Congressional debates over the 1964 Civil Rights Bill, Senator Humphrey, the floor manager of Title VII, stated that the purpose of the Bennett Amendment was to make it "unmistakably clear" that "differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law." 110 Cong. Rec. 13663-13664 (1964). Likewise, Senator Bennett, sponsor of the Amendment, declared in explaining the proposal, "The purpose of my amendment is to provide that in the event of conflicts [between Title VII and the Equal Pay Act], the provisions of the Equal Pay Act shall not be nullified." 110 Cong. Rec. 13646 (1964).[4]

The Commission, in 1965, initially issued an interpretative guideline stating it would defer to the Equal Pay Act and the Wage and Hour Administrator's interpretations as applicable to Title VII.[5] In 1972, however, the Commis-

[4]The following year, in July 1965, Senator Bennett further expounded on the meaning of his Amendment: "Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359 (1965). *Cf. Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir), *cert. denied*, 398 U.S. 905 (1970) (The Equal Pay Act and Title VII are to be construed *in pari materia*) (dictum).

[5]The 1965 guideline contains the following language:

> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act . . . in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. . . .
>
> (b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Depart-

sion issued a revised guideline, repealing its 1965 guideline, stating that the Commission no longer regarded itself as bound by Equal Pay Act interpretations.[6]

In 1965, the Wage and Hour Administrator issued a regulation interpreting the Equal Pay Act which specifically exempts from liability under the Act an annuity or insurance plan in which employer contributions to the plan are identical for all similarly situated employees even though the benefits which accrue under the plan may be greater for one sex than the other. The regulation, 29 C.F.R. § 800.116(d) (1976), reads in pertinent part:

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other.

The Wage and Hour Administrator's regulation thus specifically sanctions plans, such as the annuity and insurance plans at issue in the present case, which require equal con-

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ment of Labor. . . . Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covering both Title VII and the Equal Pay Act.

29 C.F.R. § 1604.7(a), (b), (c) (1965).

[6]The 1972 revised guideline reads in pertinent part as follows:

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

29 C.F.R. § 1604.8(b), (c) (1976).

tributions for both men and women, even though the resulting periodic annuity benefits or death benefits may differ.[7]

In 1972 the Commission promulgated its revised guidelines on sex discrimination. 29 C.F.R. § 1604.1 *et seq.* (1976). In direct conflict with the interpretative regulation issued by the Wage and Hour Administrator under the Equal Pay Act, 29 C.F.R. § 800.116(d), the Commission's new guidelines make pension or insurance plans which differentiate in benefits violative of Title VII. The relevant guideline, 29 C.F.R. § 1604.9(f) (1976), states in pertinent part:

> (f) It shall be a unlawful employment practice for an employer to have a pension or retirement plan which

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[7]The Wage and Hour Administrator in two Opinion Letters has reiterated the clear import of this regulation. A 1970 Opinion Letter responded to an inquiry concerning the applicability of the equal pay provisions to employer contributions on behalf of employees to pension or retirement plans. The Wage and Hour Administrator stated, "[W]here the employer's contributions to such a plan are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question may be greater for one sex than for the other." Wage and Hour Administrative Opinion Letter No. 1117 (W-1470), [1969-1973 Transfer Binder, Administrative Rulings] Lab. L. Rep. (CCH) ¶30,681 (August 25, 1970). Three years later the Administrator delivered a similar opinion in a situation bearing a striking parallel to the instant case. The question propounded to the Administrator was, "If an employer makes equal contributions to a retirement plan covering male and female employees but if, as a result of separate actuarial tables used by the plan's administrators, the female employees, other things being equal, receive smaller monthly retirement benefits, is the employer in violation of the equal pay provisions?" The Administrator replied by reaffirming its 1970 position: "In response to your initial question, our opinion letter of August 25, 1977 [W&H Opinion Letter No. 1117] sets forth our current position under the Equal Pay Act. We are cognizant of the recent amendments to the Civil Rights Act and the Guidelines issued by Equal Employment Opportunity Commission (EEOC) on pension benefits and we will continue to watch developments in this area. However, we do not anticipate any change in our position in the immediate future." Wage and Hour Administrative Opinion Letter, No. 1276 (WH-224), Lab. L. Rep. (CCH) ¶30,874 (April 26, 1973).

establishes different optional or compulsory retirement age based on sex, or which differentiates in benefits on the basis of sex.

Despite the deference to the Equal Pay Act and the Wage and Hour Administrator's interpretations of that Act as mandated by the Bennett Amendment, the Commission contends that its revised guideline appropriately interprets Title VII and is controlling on the question of whether the benefits plans presently at issue constitute an unlawful employment practice.

III.

The recent decision of the Supreme Court in *General Electric Co.* v. *Gilbert, supra,* controls this case and makes clear that the Wage and Hour Administrator's regulation interpreting the Equal Pay Act, 29 C.F.R. § 800.116(d), must take precedence over the Commission's conflicting interpretation of Title VII, 29 C.F.R. § 1604.9(f). The Supreme Court in *Gilbert* faced the question of whether the employee insurance plan maintained by General Electric Company violated Title VII because it excluded from its coverage disabilities arising from pregnancies. On the merits of the discrimination claim the Court found that the General Electric plan did not contravene the standards of Title VII. *Id.* at 133-40.

Particularly germane to the instant motion for summary judgment is the manner in which the *Gilbert* court treated inconsistent administrative interpretations concerning benefits for pregnancy related disabilities. A Commission guideline issued under Title VII required that such benefits be applied on the same terms and conditions as they are applied to other temporary disabilities. 29 C.F.R.

§ 1604.10(b). But the Wage and Hour Administrator's regulation promulgated under the Equal Pay Act, 29 C.F.R. § 800.116(d), relied upon both by defendant in *Gilbert* and by defendants in this action, permits disability plans in which the benefits may accrue unequally to similarly situated participants due to a participant's sex. The *Gilbert* opinion traced the legislative history of the Bennett Amendment, discussed *supra,* and its reference to the Equal Pay Act.[8] Speaking for the majority, Mr. Justice Rehnquist wrote: "Because of this [Bennett] amendment, interpretations of section 6(d) of the Equal Pay Act are applicable to Title VII as well . . . ." *Id.* at 144. The opinion went on to quote with favor the Wage and Hour Administrator's regulation, 29 C.F.R. § 800.116(d), and stated that this interpretation and the legislative history of Title VII support "what seems to us to be the 'plain meaning' of the language used by Congress" when it enacted Title VII. *Id.* at 145.[9] Accordingly, the Court held that the Wage and

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[8]Specifically, the Court noted the remarks of Senator Humphrey, 110 Cong. Rec. 13663-13664 (1964).

[9]In considering the significance of the Commission guideline, the Supreme Court noted that Congress in enacting Title VII did not confer upon the Commission authority to promulgate rules and regulations pursuant to that title and observed that therefore the Commission guidelines are entitled to less deference than administrative regulations which Congress has declared to have the force of law. *Id.* at 141; *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 484 (1942). The *Gilbert* court applied to the Commission guideline in question the formula which the Court developed in *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944), for determining the effect to be given an administrative ruling. By the *Skidmore* test the Court found the Commission guideline wanting. It neither was a contemporaneous interpretation of the statute involved nor was it consistent with earlier Commission guidelines on the same topic. *General Electric Co.* v. *Gilbert, supra* at 142-43.

A similar observation may be made with regard to the Commission guideline on pension or retirement plans at issue in this action, 29 C.F.R. § 1604.9(f). Issued in 1972, the guideline is hardly a coeval interpretation of Title VII, which Congress passed in 1964. Further-

Hour regulation, rather than the Commission guideline, was, because of the Bennett Amendment, the controlling interpretation of Title VII.

The conclusion of the Supreme Court is manifest. With regard to the specific question of benefits and insurance plans, the Wage and Hour Administrator's regulation, 29 C.F.R. § 800.116(d), accurately reflects the provisions of the Equal Pay Act. Because of the Bennett Amendment, the Equal Pay Act and proper interpretations thereof are incorporated into Title VII, where the two statutes overlap. It is apparent both from the language of 29 C.F.R. § 800.116(d) and from the 1970 and 1973 Opinion Letters of the Wage and Hour Administrator, *see* note 7 *supra*, that the retirement and insurance programs which Colby sponsors and which TIAA-CREF manage do not run counter to the terms of the Equal Pay Act. Therefore, under the rationale of *Gilbert*, the plans do not violate Title VII.

Plaintiff seeks to avoid the impact of *Gilbert* by referring the Court to *Manhart* v. *City of Los Angeles*, 553 F.2d 581 (9th Cir. 1976) (hereinafter *"Manhart I"*), *rehearing denied*, 553 F.2d 592 (9th Cir. 1977) (hereinafter *"Manhart II"*), *cert. granted*, —— U.S. ——, 46 U.S.L.W. 3184 (U.S., October 3, 1977) (No. 76-1810). The Court finds *Manhart* unpersuasive. *Manhart* dealt with a problem akin to but distinguishable from the issue raised in the case at bar. The Department of Water and Power of the City of Los Angeles maintained a retirement plan which required women employees to contribute from their wages

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more, the Commission guideline, contradicting as it does the Wage and Hour Administrator's regulation, 29 C.F.R. § 800.116(d), is a substantial departure from the previous guideline issued in 1965 in which the Commission stated it would defer to the Wage and Hour Administrator's interpretations on equal pay questions. 29 C.F.R. § 1604.7(b) (1965).

to the pension fund 15% more than similarly situated males because of the longer average life expectancy of women. The periodic monthly benefits paid to all similarly situated retirees, male and female, however, were identical. The first time it considered the issue a panel of the Court of Appeals for the Ninth Circuit found the program to be in violation of Title VII. *Manhart I*.

Shortly thereafter, the Supreme Court announced its decision in *General Electric Co.* v. *Gilbert*, *supra*. Defendant City of Los Angeles petitioned for rehearing in light of *Gilbert*, but a majority of the same panel of the Ninth Circuit, one judge dissenting, denied the request and held that *Gilbert* did not require a change in the Court of Appeal's initial judgment. *Manhart II*. In reaching its decision on the petition for rehearing, the panel majority distinguished *Manhart* from *Gilbert* on the ground that in *Manhart* the out-of-pocket cost of the plan to women was greater than the out-of-pocket cost to men solely because of the women's gender. *Gilbert* did not involve such a discrepancy in employee contributions. The *Manhart* majority found a qualitative distinction between a benefits program in which the direct cost to the participant varies on the basis of the participant's sex and one in which the benefits accrue differently to one group of enrollees than to another due to the sex of the particular class of enrollees. *Manhart II*, *supra* at 593.

Unlike the program in *Manhart*, defendants' retirement and insurance plans do not assess greater contributions against members of one sex than another. All similarly situated participants pay an equal percentage of their salaries into the annuity and insurance funds, and Colby's contribution is identical for each similarly situated participant. *Manhart*, moreover, did not involve a conflict between a Commission guideline and a regulation issued by

the Wage and Hour Administrator.[10] In the instant case, as was true in *Gilbert*, there exists such a conflict. As discussed above, the Supreme Court in *Gilbert* placed its imprimatur on precisely the same regulation of the Wage and Hour Administrator at issue in this action. *Manhart*, therefore, differs from the case at bar both factually and as a matter of law. To the extent that the panel majority in *Manhart II* diverges from this Court's construction of *Gilbert*, this Court must respectfully disagree.[11]

Defendants' motion for summary judgment is granted, and judgment will be entered dismissing the complaint.

IT IS SO ORDERED.

Dated at Portland, Maine, this 27th day of October 1977.

EDWARD T. GIGNOUX
United States District Judge

A TRUE COPY

ATTEST: ELIZABETH SAX, Clerk

By ELIZABETH SIMMONS
Deputy Clerk

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[10]The Secretary of Labor, under whose authority the Wage and Hour Administrator serves, filed a brief as amicus curiae in *Manhart I* which emphasized that the Department of Labor has never approved of a practice requiring unequal employee contributions to a pension plan on the basis of sex. Amicus brief at 4, 6. The Secretary's brief painstakingly distinguished the benefits plan challenged in *Manhart* from the type of plan endorsed by the Wage and Hour Administrator in 29 C.F.R. § 800.116(d). Amicus brief at 12-14.

[11]Plaintiff also seeks support from an opinion of the Indiana Supreme Court in *Reilly* v. *Robertson*, ____ Ind. ____, 13 E.P.D. (CCH) ¶ 11,626 (Indiana Supreme Court, February 22, 1977). *Reilly* held that the use of separate mortality tables in computing retirement benefits for male and female public school teachers, which resulted in lower periodic payments to female retirees, violated Title VII. Although released after the Supreme Court issued *General Electric Co.* v. *Gilbert*, *Reilly* does not mention *Gilbert*, and its precedental value must be discounted accordingly.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES W. PAUL, being duly sworn deposes and says that he served the foregoing Brief upon the attorney for Petitioners herein, on November 17, 1977, by mailing three true and correct copies thereof, air mail postage prepaid to Burt Pines, Esq., City Attorney, 111 North Hope Street, P.O. Box 111, Los Angeles, California 90051, and upon the attorneys for Respondents, on November 17, 1977, by mailing three true and correct copies thereof, air mail postage prepaid to Robert M. Dohrmann, Esq., Schwartz, Steinsapir, Dohrmann & Krepack, Two Century Plaza, 2049 Century Park East, Los Angeles, California 90067.

/s/ JAMES W. PAUL
James W. Paul

Sworn to before me this
17th day of November, 1977.

.....
Notary Public